IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

OSA No.13 of 1999.

Judgment reserved on: 5.3.2007.

Date of decision: 14th March, 2007.

H.P.S.E.B. …..Appellant

-Versus-

M/s.Ansal Properties and Industries Ltd. ….Respondent

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.
The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting? No

For the Appellant: Mr.K.D.Sood, Advocate.

For respondent: Mr.Ajay Kumar & Mr.Y.Paul, Advocates for the respondent.

Deepak Gupta, J.

This appeal is directed against the judgment and decree of the learned single Judge in Civil Suit No.33 of 1998 whereby he has dismissed the objections filed by the appellant (hereinafter referred to as the Board) and partially allowed the objections filed by the respondent-claimant (hereinafter referred to as the Contractor) and made the award of the Arbitrator dated 24.2.1998 rule of the Court with certain modifications.

Brief facts necessary for the decision of this appeal are that the Board had invited tenders for construction of Civil Work of Baner Project. The work of this Project was initially awarded to one M/s.Sutlej Construction Company, Chandigarh. However, later for reasons which are not germane for decision of the present case, the said contract was rescinded.

Thereafter, the Board asked the contractors herein to do the work since they were the second lowest bidders. They were asked to execute the balance work of the Baner Project on the same terms and conditions as Sutlej

Constructions. The Contractor agreed to do some of the work at the rates agreed to by Sutlej Construction but as per the case set up by the Contractor as far as the tunneling rates were concerned there was no agreement between the parties.

After the work was completed disputes arose between the parties which were referred, as per the terms of the contract, for decision by the Arbitrator Sh.O.C. Kaushal. The Arbitrator made his award on 21.8.1995 awarding a total amount of Rs.20,76,655/- as well as pendente lite interest @ 15% p.a. w.e.f. 23.8.1993 to 21.8.1995 on the principal amount. Thereafter, the Arbitrator filed his award in this Court to be made rule of the Court.

Both the parties filed objections of the award. The award of the learned Arbitrator was set-aside on the ground that it was not a speaking award and the matter was remitted to the Arbitrator. The learned single Judge had directed the Board to appoint another Arbitrator in place of Sh.O.C. Kaushal. The Contractor filed an appeal and a Division Bench of this Court vide its judgment dated 12.6.1997 in FAO No.43 of 1997 partly accepted the appeal and decided that the matter would be heard by Sh.O.C. Kaushal. The Board challenged the order of the Division Bench before the Apex Court but the same was dismissed by the Apex Court with certain observations.

After remission, the Arbitrator heard both the parties and again passed a similar award for Rs.20,76,655/- on 24.2.1998. He however again awarded interest @ 15% p.a. only from 23.8.1993 to 21.8.1995 only. This award was filed for making rule of the Court and both parties filed objections thereto. The learned single Judge of the Court rejected the objections of the Board and partly allowed the objections of the Contractor and awarded interest @ 15% p.a. from 23.8.1993 to 24.2.1998 (i.e. the date of the award passed after remission) and thereafter from 24.2.1998 till 3.6.1999 the date of passing of the judgment and decree by the single Judge and also future interest at the same rate from the date of decree till realization of the award.

Aggrieved against the said order and decree the Board has filed the present appeal.

Three main contentions have been raised by Sh.K.D.Sood, learned counsel for the Board. His first contention is that the parties had entered into a contract whereby they had agreed that the rates payable to the Contractor were to be the same which were to be paid to M/s.Sutlej Construction and that in view of the contract having been entered into between the parties, the Contractor could not raise the plea that the rates for tunneling had not been settled. His second contention is that despite the clear cut orders passed by this Court while setting aside the earlier award the Arbitrator has again not given any reasons for awarding Rs.90,000/- under issue No.4 (claim No.3). His last contention is that the learned single Judge has gravely erred in setting aside the award of the Arbitrator and awarding interest @ 15% p.a. for the period after 21.8.1995. On the other hand, Sh.Ajay Kumar, learned counsel for the Contractor supported the order of the learned single Judge.

CONTENTION No.1:

To appreciate the first contention of the learned counsel for the Board it would be pertinent to refer to certain facts. As pointed out above, the contract in question was first awarded to M/s.Sutlej Construction Company. This contract was later on rescinded and vide Ext.C-1/1 dated 24th November, 1990 the Board invited the contractor to execute the balance work of the Baner Project on the same terms and conditions as previously agreed to by M/s.Sutlej Construction Company. The Contractor replied to this letter vide letter dated 13th December, 1990 (Ext.C-2/1). In this letter the contractor had clearly stated that they would execute the construction work on the same rates as quoted by the previous contractor except for the works relating to open excavation, underground excavation and final concreting of tunnel for which works the rates as quoted by them in their original tender should be applicable. There was protracted correspondence between the Board and the

Contractor and whereas the Board was insisting that the Contractor should do the work at the rates agreed to and quoted by M/s.Sutlej Construction Company, the Contractor kept on insisting that for the excavation and other tunneling works they should be paid the rates originally quoted by them. The Board thereafter issued a letter dated 7th January, 1991 (Ext.C-4/1) to the contractor asking the Contractor to enter into the contract. While awarding the work in favour of the contractor the Board did not accept the condition of the contractor for revision of higher rates of tunneling. The contractor did not accept this proposal of the Board also and sent another letter on 19.1.1991 requesting that as far as tunneling rates are concerned a Committee be constituted to look into the matter in its totality. The contractor also agreed to be bound by the decision of the Committee. The Contractor insisted that the correspondence exchanged between the parties should be part of the contract. On 18.2.1991 the Board sent another letter and rejected the request of the contractor for referring the question of tunneling rates to a Committee and directed the contractor to do tunneling work at the rates quoted by M/s.Sutlej Construction Company, Chandigarh. In this letter one sentence is relevant which reads as follows:

> "However, you may send detailed justification for higher rates of tunneling."

By the same letter the contractor was requested to sign the contract forthwith and it was mentioned that all the terms and conditions which have been mutually agreed can be incorporated in the contract. The contractor vide its letter dated 21.2.1991 informed the Board that they would be signing the contract agreement and also stated that they would approach the Board for getting the matters amicably.

In view of the detailed correspondence entered into between the parties, we are of the considered opinion that both the Arbitrator as well as

the single Judge were right in concluding that there was no concluded contract between the parties as far as the tunneling rates were concerned. Though the Board was insisting that the tunneling work be done at the same rates as quoted by M/s.Sutlej Construction Company, the Contractor had always insisted that the tunneling rates be paid to it as originally quoted by it. Later on the contractor even requested that a Committee be set up to assess the tunneling rates which request was not accepted by the Board. However, the Board also kept the matter open by asking the contractor to send detailed justification for higher rates of tunneling. It cannot, therefore, be said that there was a concluded contract as far as rates of tunneling are concerned and as such the contractor was well within his rights to claim higher rates for tunneling. The Arbitrator has given valid reasons for holding that the contractor was entitled to the amount and has also assessed the amount by giving reasons. This contention on behalf of the Board is rejected.

CONTENTION NO.2:

This contention of the Board is that with regard to issue No.4 the Arbitrator has not given any reasons. The Arbitrator has dealt with the claim in the following terms:

> "Issue No.4 (Claim No.3)
> Rs.6,60,000/-
>
> "Whether the Claimants are entitled to claim on account of disposal of soil beyond specified limit and if so to what extent."
>
> Both the parties reiterated the submissions/arguments made in respect of this issue in the earlier award.
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> I have carefully gone through the statements/documents/ written arguments of both the parties and also inspected the site in the presence of both the parties and heard their respective contentions. During the hearing held both the parties have reiterated their earlier stands and no new point was brought to my notice. During the inspection of site on 5.1.95 I had assessed the quantities of soil disposed by the Contractors about 6000 cubic metre. I had also estimated the rate for the lead for which the soil was disposed of which

comes to Rs.70/- per cubic metre. As such the claim of the Contractor has been allowed for an amount to Rs.90,000/- only and I award the same in favour of the Claimant."

The contention of Sh.K.D.Sood, is that the Arbitrator has not given any reasons for awarding Rs.90,000/-. We are in agreement with this contention of Mr.Sood. According to the Arbitrator he had inspected the site on 5.1.1995 and had assessed the quantity of soil disposed of by the Contractor at about 6000 cubic metre. Further according to him he had estimated the rate for disposal at Rs.70/- per cubic metre. In our opinion this conclusion arrived at by the contractor has no apparent basis. He has not given the reasons as to how he assessed the quantity of soil disposed of at 6000 cubic metres. Were any measurements done? If so, what were the measurements? How was the calculations done? Similarly there is no reason for assessing the rate of disposal at Rs.70/- per cubic metre.

In our opinion the learned single Judge gravely erred in holding that the award of the Arbitrator with regard to Issue No.4 is a reasoned award. The mere fact that he was a Chief Engineer of the Board and well-versed in the field of engineering does not mean that he is not required to give measurements, calculations etc. while arriving at the final assessment of the claim. There was nothing technical in this part of the award. Measurements and calculations were only required to be given. We, therefore, set-aside the award of the Arbitrator in so far as Issue No.4 is concerned and remit this claim No.3 for decision afresh to the Arbitrator who shall give his fresh findings on issue No.4 (Claim No.3) after giving reasons, calculations and measurements. He shall do so after hearing the parties.

CONTENTION NO.3:

The last contention relates to interest. According to Mr.Sood, the contractor was not entitled to any interest in terms of Clauses 9(b), 9(c) and

4-A(1) of the Contract. In the alternative he submits that the Arbitrator had exercised his discretion while awarding the interest and the learned single Judge should not have inteferred in the same. Lastly he submitted that the rate of interest awarded is very much on the higher side.

In our opinion, as far as interest is concerned, any party who is deprived of his rightful claim would be entitled to interest for the entire period he is deprived of this amount. Therefore, we are in agreement with the learned single Judge that the claimant was entitled to interest on the entire principal amount from the date the Arbitrator entered reference i.e. 23.8.1993 till the realization of the awarded amount. However, we feel that the rate of interest i.e. @ 15% awarded by the learned Arbitrator and learned single Judge is very much on the higher side. While taking this view we are guided by the judgment of the Apex Court in **Krishna Bhagya Jala Nigam Ltd. Vs.G.Harischandra Reddy and another, 2007(1) Arb.LR 148 (SC),** wherein the Apex court has held as follows:

> "11……We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award. Here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendent elite period and future interest be reduced to 9%."

Following the aforesaid judgment of the Apex Court, we reduce the rate of interest as awarded by the learned single Judge from 15% to 9% p.a. Shortly stated the contractor shall be entitled to interest on the awarded amount of Rs.19,86,655/- @ 9% p.a. from 23.8.1993 till realization of the said amount.

In view of the above discussion, the appeal filed by the Board is partly allowed. The judgment and decree of the learned single Judge is modified

and the award of the Arbitrator is partly set-aside. The Award of the Arbitrator for Rs.90,000/- against issue No.4 is set-aside and the matter is remitted to the Arbitrator Sh.O.C. Kaushal for deciding the same afresh in the light of the aforesaid judgment. As far as the award of Rs.19,86,655/- against the claim Nos.1&2 is concerned the same is upheld. The Contractor shall also be entitled to interest @ 9% p.a. on this amount w.e.f. 23.8.1993 till realization.

The Appeal is disposed of in the aforesaid terms. No order as to costs.

(Deepak Gupta),
Judge

March 14, 2007. **(Surinder Singh)**
PV **Judge**